No. 3637.

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United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

BENJAMIN KATHRINER and JAMES SULLIVAN,
Plaintiffs in Error,
vs.
THE UNITED STATES OF AMERICA,
Defendant in Error.

BRIEF OF PLAINTIFFS IN ERROR.

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I.

STATEMENT OF THE CASE.

On the 21st day of May, 1920, the United States Attorney for the Northern District of California filed an information numbered 8432 against Ben. J. Kathriner and James F. Sullivan, charging that the defendants did on the 23rd day of April, 1920, at San Francisco, violate Section 21 of Title II of the Act of October 28, 1919, known as the National Prohibition Act, in that they maintained a common nuisance in that they did unlawfully, wilfully and knowingly keep on the premises situated at 1123 Folsom Street certain intoxicating liquor, to-wit, about one quart brandy containing one-half of one per cent or more of alcohol by volume.

The second count of the information charged that the defendants did on the 23rd day of April, 1920, at San Francisco, violate Section 3 of Title II of the Act of October 28, 1919, known as the National Prohibition Act, in that they did unlawfully have in their possession for beverage purposes, certain intoxicating liquor, to-wit, about one quart of brandy containing one-half of one per cent or more of alcohol by volume.

The defendants interposed a demurrer to the information upon the ground that the information did not state a public offense against the defendants or either of them. On June 21, 1920, the demurrer to the information was overruled.

Thereafter the defendants entered a plea of not guilty to the information. On the 23rd day of September, 1920, the defendants were tried before a jury and the jury returned a verdict on said day, finding the defendants not guilty on the second count of the information, but guilty on the first count of the information. In other words, the defendants were found not guilty of the count charging the unlawful possession of intoxicating liquor, but were found guilty of maintaining a common nuisance in that they had unlawfully in their possession intoxicating liquor at the time and place charged in the information.

Thereafter, on the 25th day of September, 1920, the defendants interposed a motion for a new trial, which was denied, and a motion in arrest of judgment, which was also denied. Thereupon judgment was rendered, sentencing the defendant James F. Sullivan to be imprisoned for a period of three months and defendant Ben J. Kathriner to be imprisoned for a

period of six months in the county jail of San Francisco. A writ of error was thereupon sued out by the defendants to review the judgment and proceedings of the trial court.

II.

SPECIFICATIONS OF THE ERRORS RELIED UPON.

1. The Court erred in denying the motion of defendants in arrest of judgment upon the ground that the first count of the information does not state facts sufficient to constitute a public offense. This point was also raised by the demurrer filed to the information and also by a motion for a directed verdict of not guilty made at the close of the Government's case.

2. The Court erred in denying the motion of the defendants for a directed verdict of not guilty upon the ground that the evidence offered did not establish the commission by the defendants of a public offense against the laws of the United States.

3. The Court erred in overruling the objection of the defendants to the admission in evidence of the alleged liquor seized upon the premises of the defendants at the time of their arrest. The evidence disclosed that the prohibition officers went into the soft drink establishment of the defendants about half-past twelve on the 20th day of April, 1920, walked up to the bar, told the bartender who they were and jumped over the bar and made a search of the premises and seized a small quantity of liquor in a pitcher behind the bar. (Trans., fol. 21.) The officers testified that

they did not have any search warrant and made the search of the premises without a warrant. (Trans., fols. 24-28.)

ARGUMENT.

1. The defendants maintain that the first count in the information does not state facts sufficient to constitute a public offense in that the possession of intoxicating liquors is not a violation of any valid law of the United States. It is alleged in the first count that the defendants maintained a common nuisance in that they unlawfully kept on their premises certain intoxicating liquor. The 18th Amendment to the Constitution of the United States does not prohibit the possession of intoxicating liquors. It merely prohibits the manufacture, sale or transportation of intoxicating liquor.

The 18th Amendment reads as follows:

> Section 1. After one year from the ratification of this article, the manufacture, sale or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from, the United States and all territories subject to the jurisdiction thereof, for beverage purposes, is hereby prohibited.
>
> Section 2. The Congress and the several states shall have concurrent power to enforce this article by appropriate legislation.

Congress has no power to enact any legislation prohibiting the use of intoxicating liquor within the States save in so far as the power was granted to it by the 18th Amendment to the Constitution. Sections 3 and 21 of the Volstead Act in so far as they

prohibit the possession of intoxicating liquor are unconstitutional for the reason that the 18th Amendment nowhere delegates such power to the Congress but merely authorizes legislation prohibitory of the manufacture, sale and transportation of intoxicating liquors.

In the United States the sovereignty is vested in the people. By the Constitution of the United States certain powers have been delegated by the people to the Federal Government. And so it has been well said by Judge Storey in the case of *Martin* vs. *Hunter,* 1 Wheat. 323:

> "The Constitution of the United States was ordained and established, not by the states in their sovereign capacities, but emphatically as the preamble of the constitution declares, by 'The People of the United States.' There can be no doubt that it was competent for the people to invest the general government with all the powers which they might deem proper or necessary; to extend or restrain those powers according to their own good pleasure, and to give them a paramount and supreme authority. As little doubt can there be, that the people had a right to prohibit to the States the exercise of any powers which were, in their judgment, incompatible with the objects of the general compact; to make the powers of the state governments, in given cases, subordinate to those of the nation or to reserve to themselves those sovereign authorities which they might not choose to delegate to either. These deductions do not rest upon general reasoning, plain and obvious as they seem to be. They have been positively recognized by one of the articles in amendment of the Constitution, which declares that 'the powers not delegated to the United States by constitution nor prohibited by it to the states,

> are reserved to the states respectively or to the people'.
>
> "The government then of the United States can claim no powers which are not granted to it by the constitution, and the powers actually granted must be *such* as are expressly given, or given by necessary implication. On the other hand, this instrument, like every other grant, is to have a reasonable construction, according to the import of its terms, and where a power is expressly given in general terms, it is not to be restrained to particular cases, unless that construction grows out of the context, expressly or by necessary implication. The words are to be taken in their natural and obvious sense, and not in a sense unreasonably restricted or enlarged."

Being therefore a government of restricted and enumerated powers, the Congress had no greater authority to legislate upon the subject of prohibition than was granted to it by the language of the 18th Amendment. That language is not ambiguous and clearly prohibits merely the manufacture, sale or transporation of intoxicating liquors. And, accordingly, Congress is by Section 2 of the Amendment merely empowered to enforce the article by legislation appropriate to bring about a prohibition of the manufacture, sale or transportation of intoxicating liquors. No power whatever is granted to Congress to prohibit the possession of intoxicating liquor. Nor can it be said that the legislation prohibiting the possession of intoxicating liquor is justified by Section 2 of the Amendment, for it cannot reasonably be maintained to be necessary to prohibit the possession of intoxicating liquor in order to efficiently legislate against its sale, manufacture or transportation.

Furthermore, the omission of a prohibition against possession of intoxicating liquor in the 18th Amendment was undoubtedly a premeditated and intentional one. Millions of dollars were invested in intoxicating liquors at the time of the adoption of the 18th Amendment and to prohibit the possession of this property except under very restricted conditions, may well be said to be tantamount to the confiscation of it. It is but reasonable to conclude that the people in adopting the 18th Amendment had in mind the prohibition of all further manufacture of and commerce in intoxicating liquors but at the same time intended that those having possession of intoxicating liquors might retain possession of them and use them until the stock was exhausted.

> "An intention to take away or destroy individual rights is never presumed, and to give effect to a design so unjust and so unreasonable would require the support of the most direct and explicit affirmation declarative of such intent."
>
> *Chance* vs. *Marion County,* 64 Illinois 66.

An examination of the authorities bearing upon prohibition legislation heretofore adopted by the various States sheds little or no light upon the precise question involved in the case at bar. The State legislatures, of course, have all the powers not delegated to the United States nor prohibited by the Federal Constitution to the States. Accordingly prohibition enactments even of the most drastic kind, adopted by various State legislatures have been up-

held as a proper exercise of the police powers of the States. Congress, however, has no such power.

Mugler vs. *Kansas,* 132 U. S. 623.

In the case of *State* v. *Gilman,* 33 West Va. 146, the defendant was charged with having liquor in his possession. The State Constitution provided "that laws might be passed regulating or prohibiting the sale of intoxicating liquors within the State". The Legislature passed a law prohibiting among other things, "the keeping in one's possession, for another, of spirituous liquors". The question presented was whether this provision came within the purview of "regulating or prohibiting the sale of spirituous liquors". The Supreme Court of West Virginia held that it did not, saying in the course of an able opinion:

> "By granting an express authority to the legislature to regulate or prohibit the sale, there is an implied inhibition to the exercise of any authority in respect to that subject which is not embraced in the grant. This rule is simply an application of the old maxim, *expressio unius est exclusio alterius,* which Lord Bacon concisely explains by saying: 'As exception strengthens the force of a law in cases not excepted, so enumeration weakens it in cases not enumerated.' The express power here given to regulate or prohibit the sale of liquors, unless it was intended to limit the legislative authority, would render this provision of the Constitution wholly nugatory and useless; because as we have seen without this provision, the legislature would have had plenary power over the whole subject. . . .
>
> "From what we have said, it is apparent that the provisions of the statute under consideration are not a fair and reasonable exercise of the police

power, NOR HAS IT ANY REFERENCE TO THE PROHIBITION OR SALE OF LIQUOR. IT IS SIMPLY AN ATTEMPT TO MAKE THE POSSESSION OF LIQUOR FOR ANY PURPOSE A CRIME. A very different question would have been presented if the act had made it unlawful for any person to keep intoxicating liquor in his possession, either for himself or for another, for the purpose of selling it, or as a device to evade the revenue laws. But this provision has nothing in it of the kind. It makes the mere possession for another, without regard to the intent or purpose of either the possessor or of the person for whom it is kept, a crime."

Another case upon the same point is *EX PARTE FRANCIS,* decided by the Supreme Court of Florida Aug. 13, 1918 and reported in 79 So. 753. In that case, the defendant was charged among other things, with having had possession of an excessive quantity of liquor in dry territory. The Court in deciding that while under the Constitution, the legislature could prohibit the sale of liquor, yet it exceeded its power in denying the right of possession, said:—

"Section 1 of Art. 19 of our Constitution reserves to the people the right by their direct vote to prohibit the sale only of intoxicating liquors, NOT THEIR OWNERSHIP, POSSESSION OR INDIVIDUAL USE BY THE CITIZEN, and by the second section of the Article, the legislature is expressly authorized and required to enact laws to carry out the provisions of Section 1; that is to enforce the prohibition against the sale, AND WHEN THE LEGISLATURE GOES OUTSIDE THE REALM OF LAW AIMED AT PROHIBITING THE UNLAWFUL SALE OF SUCH LIQUOR, BY IN-

HIBITING THEIR PRIVATE OWNERSHIP, POSSESSION OR PERSONAL USE, IT TRANSCENDS ITS AUTHORITY UNDER THE CONSTITUTION."

In 15 R. C. L. Sec. 19, it is said:

> "Generally speaking it is the traffic and not the liquor itself which is subject to the police power; and the property right, the privilege of the individual to acquire and use liquors to satisfy his own personal tastes and appetites should remain inviolate. It has been held generally that the mere possession and use for such purposes are not inherently injurious to the health, morals or safety of the public, and therefore that legislation prohibiting such acts is not a legitimate exercise of police power, but on the contrary is an abridgment of immunities of the citizen without any legal justification, and as such, void. . . ."

So also in JOYCE on Intoxicating Liquors, we find the statement:—

> "A constitutional provision that 'laws may be passed regulating or prohibiting the sale of intoxicating liquors' is held to impose a restraint upon the plenary and unrestricted power of a legislature to deal with the subject of such liquors in any manner it chooses to. IN SUCH A CASE IT IS DECLARED THAT THE PURPOSE AND EFFECT OF THE PROVISION IS TO RESTRICT AND LIMIT THE LEGISLATIVE AUTHORITY TO THE POWERS EXPRESSLY GRANTED THEREIN, THAT IS TO THE POWER TO REGULATE AND PROHIBIT THE SALE, the rule being said to be simply an application of the maxim, *'expressio unius est exclusio alterius'*."

Joyce on Intoxicating Liquors, Sec. 79.

And as it has also in many jurisdictions been held to be an unlawful exercise of the police power of a State to prohibit the possession of intoxicating liquor; how much more unwarranted is this exercise of power by Congress, whose authority is much more limited than that of State Legislatures and is confined under the 18th Amendment to the enactment of appropriate legislation prohibiting the sale, manufacture or transportation of intoxicating liquors.

Joyce on Intoxicating Liquors, Sec. 85;
Comm. v. *Campbell,* 117 S. W. 385;
State v. *Fitzpatrick,* 16 R. I. 54.

And in the recent case of *Street* v. *Lincoln Safe Deposit Co.,* 254 U. S. 88, the Court in upholding the legality of the possession of lawfully acquired liquor in a safe deposit vault stated:—

> "The Congress was concerned with the great problem of preventing the manufacture and sale of intoxicating liquors for beverage purposes in the future and it seems to have given but slight attention to the consumption of such relatively small amounts of such liquors as might be in existence in private ownership and intended for consumption by the owner, his family or his guests, when the amendment and the Act should take effect.
>
> "An intention to confiscate private property even in intoxicating liquors will not be raised by inference, and construction from provisions of law which have ample field for other operation, in effecting a purpose clearly indicated and declared."

And Justice McReynolds in his concurring opinion in the same case said:—

> "I think the Volstead Act was properly interpreted by the Court below; but to enforce it as thus construed would result in virtual confiscation of lawfully acquired liquors by preventing or unduly interfering with their consumption by the owner. *The Eighteenth Amedment gave no such power to Congress. Manufacture, sale and transportation are the things prohibited—not personal use.*"

2. The trial Court erred in overruling the objection of defendants to the admissibility of the liquor in evidence for the reason that it was obtained through an unlawful search and seizure, made without a search warrant.

The testimony showed that the officers entered the soft drink parlor of the defendants and without a warrant or process of any kind, jumped over the bar and made a search, seizing a small quantity of liquor behind the bar. (Trans. fols. 24-28.)

Section 25 of Art. II of the Volstead Act provides for the issuance of search warrants as provided in the Act of Congress, approved June 15th, 1917. In addition it limits the issuance of search warrants for private dwellings to cases where the dwelling is being used for actual sales of intoxicating liquor or is in part used for business purposes, such as a store, shop, saloon, restaurant, hotel or boarding house. Accordingly it was necessary for the officers to have obtained a search warrant before making any search and seizure of the property on the premises of defendants and not having done so under the provision of the 4th and 5th Amendments to the Constitution of the United States the property seized was not admissible in evidence against the defendants.

In discussing the necessity of a search warrant under the Volstead Act the District Court of the Eastern District of Pennsylvania in the case of *United States* vs. *Crossen,* 267 Fed., page 459 said:—

> "A careful analysis of the Act makes it apparent that in no case is a Prohibition officer or agent justified in seizing liquor or other property without a search warrant, except as provided in Section 26, which makes it his duty to seize all intoxicating liquors found being transported contrary to law in any wagon, buggy, automobile, water or air craft or other vehicle."

And also in the case of *United States* vs. *Bush,* 269 Fed 457, the Court said:—

> "Hence a search for stolen goods upon a valid warrant and seizure is a legal procedure, but a search and seizure is illegal and unreasonable under the Fourth Amendment of the Constitution, when conducted without first obtaining a legal warrant upon probable cause, supported by oath or affirmation, and as the constitution provides, particularly describing the place to be searched and the person or things to be seized. Evidence obtained by an invalid search and seizure to prove possession is in effect a requirement that the accused be a witness against himself.

Silverthorne Lumber Co., Inc., vs. *U. S.* 251 U. S. 385;
Flagg vs. *U. S.* 233 Fed. 481;

> "Indeed, in the Flagg case clues, leads and information developed from an illegal search and seizure were held inadmissible against the defendant."

Edelstein vs. *U. S.* 149 Fed 636;
See also *Gouled* vs. *U. S.* 41 Supreme Court Reporter 261;

Amos vs. *U. S.* 41 Supreme Court Reporter 266;
Weeks vs. *U. S.* 232 U. S. 383;
U. S. vs. *Kelih,* 272 Fed. Reporter 484."

Agent Hanley in his testimony stated that they did not have a search warrant and said that they did not require any, as the premises of the defendants were a saloon and public place (Trans. fol. 28.) We respectfully submit that even a saloon is protected from an unlawful search and seizure of property therein by the provisions of the 4th and 5th Amendments to the Constitution of the United States. In the case of *Amos* vs. *U. S.,* 41 Supreme Court Reporter 261, the officers entered the store of the defendants and yet the seizure was held to be an unreasonable and improper one.

Neither can it be contended here that because defendants did not move for the return of the seized property before the trial, their objection to its admissibility in evidence was correctly overruled. If this property was unlawfully seized from the defendants through an illegal search of their premises then under the 5th Amendment to the Constitution to admit it in evidence on their trial of a criminal charge, was tantamount to compel them to be witnesses against themselves. Moreover the rule that a motion for a return of the property seized should be made before the trial is only a rule of procedure and is not to be applied as a hard and fast formula to every case. This is the exact expression used in the case of *Gouled* vs. *U. S., supra,* in which the Court said:—

> "While this is a rule of great practical importance, yet, after all, it is only a rule of procedure and therefore it is not to be applied as a

hard and fast formula to every case, regardless of its special circumstances. We think rather that it is a rule to be used to secure the ends of justice under the circumstances presented by each case, and where, in the progress of a trial, it becomes probable that there has been an unconstitutional seizure of papers, it is the duty of the trial court to entertain an objection to their admission or a motion for their exclusion and to consider and decide the question as then presented, even where a motion to return the papers may have been denied before trial. A rule of practice must not be allowed for any technical reason to prevail over a constitutional right."

The officers of the Government in the case at bar were manifestly of the opinion that they could enter premises and make searches and seizures without obtaining any warrant and without regard to the Constitutional rights of the owners of the premises. To permit a conviction of the defendants upon such evidence to be sustained would constitute a flagrant violation of the rights secured to the defendants by the 4th and 5th Amendments to the Constitution of the United States.

In the case of *Gouled* vs. *U. S.,* the Court in emphasizing the importance of an adherence to the requirements of the 4th Amendment said:—

"It would not be possible to add to the emphasis with which the framers of our Constitution and this Court (in *Boyd* v. *United States,* 116 U. S. 616, 6 Sup. Ct. 524, 29 L. Ed. 746, in *Weeks* v. *United States,* 232 U. S. 383, 34 Sup. Ct. 341, 58 L. Ed. 652, L. R. A. 1915B. 834, Ann. Cas. 1915C. 1177, and in *Silverthorne Lumber Co.* v. *United States,* 251 U. S. 385, 40 Sup. Ct. 182, 64 L. Ed. 319) have declared the importance to political liberty and to the welfare of our country of

> the due observance of the rights guaranteed under the Constitution by these two amendments. The effect of the decisions cited is: That such rights are declared to be indispensable to the 'full enjoyment of personal security, personal liberty and private property'; that they are to be regarded as of the very essence of constitutional liberty; and that the guaranty of them is as important and as imperative as are the guaranties of the other fundamental rights of the individual citizen—the right to trial by jury, to the writ of habeas corpus, and to due process of law. It has been repeatedly decided that these amendments should receive a liberal construction, so as to prevent stealthy encroachment upon or 'gradual depreciation' of the rights secured by them, by imperceptible practice of courts or by well-intentioned, but mistakenly overzealous, executive officers."

For the foregoing reasons, I submit the judgment of the trial Court should be reversed.

Respectfully submitted,

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